INDIANA JUDICIAL CENTER

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

VOL. XXIX, NO. 5 **February 8, 2002**

CRIMINAL LAW ISSUES

RIOS v. STATE, No. 49A02-0105-CR-265, ___ N.E.2d ___ (Ind. Ct. App. Jan. 31, 2002). BARNES, J.

We . . . hold that there is no seizure of a mailed package within the meaning of the Fourth Amendment when it is briefly detained for further law enforcement investigation and its delivery is not substantially delayed. Because there is no seizure, the Fourth Amendment is not implicated, and law enforcement officials need not possess "reasonable suspicion" before briefly detaining a package. . . . Briefly setting aside a mailed package for further investigation is not "meaningful interference" with the recipient's possessory interests in the package where ultimate delivery of the package is not substantially delayed. [Footnote omitted.] [Citations omitted.]

We are satisfied that the temporary detention of Rios' package by officer Brannon so that it could be subjected to a canine smell test was such that there was no meaningful interference with Rios' possessory interest in the package. . . .

. . . .

FRIEDLANDER and VAIDIK, JJ., concurred.

COOPER v. STATE, No. 79A05-0107-CR-292, ___ N.E.2d ___ (Ind. Ct. App. Feb. 4, 2001). GARRARD, Senior Judge

Last year in *Smith v. State,* 751 N.E.2d 280, 282 (Ind. Ct. App. 2001), *aff'd on rehearing,* 755 N.E.2d 1150 (Ind. Ct. App. 2001), *trans. denied*, this court held that the investigating police officer's training and experience is the only evidentiary foundation required for the admission of evidence concerning the administration of standard field sobriety tests. [Footnote omitted.] . . .

The *Smith* court, however, expressly noted that it did not decide what foundation was required for testimony regarding the horizontal gaze nystagmus (HGN) test since it had not been administered in Smith's case. . . . [O]ur research discloses that Indiana has not directly ruled on the admissibility of HGN evidence in OWI cases. [Footnote omitted.] . . .

"Nystagmus is an involuntary jerking of the eyeball. [The involuntariness differentiates it from other field sobriety tests.] The jerking may be aggravated by central nervous system depressants such as alcohol or barbiturates. [citation omitted]. Horizontal gaze nystagmus is the inability of the eyes to maintain visual fixation as they are turned to the side. In the HGN test the driver is asked to cover one eye and focus the other on an object (usually a pen) held by the officer at the driver's eye level. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeball to detect

involuntary jerking. The test is repeated with the other eye. By observing (1) the inability of each eye to track movement smoothly, (2) pronounced nystagmus at maximum deviation and (3) onset of the nystagmus at an angle less than 45 degrees in relation to the center point, the officer can estimate whether the driver's blood alcohol content (BAC) exceeds the legal limit of .10 percent." *State v. Superior Court in and for Cochise Co.*, 149 Ariz. 269, 718 P.2d 171,173, 60 ALR4th 1103, 1110 (Ariz. 1986).

. . . .

In approving use of HGN in *State v. Baue,* 258 Neb. 968, 607 N.W.2d 191 (2000), the Nebraska Supreme Court cited cases in seventeen other state court jurisdictions that have approved the use of HGN in drunk driving cases. Moreover, in *Superior Court,* appendices to the opinion cite 29 articles and papers dealing with the subject. (The interested reader may pursue these, but we find it unnecessary to do so here.) [Footnote omitted.]

We agree with the courts in *Superior Court* and *Baue* that the results of a properly administered HGN test are admissible to show impairment which may be caused by alcohol and, when accompanied by other evidence, will be sufficient to establish probable cause to believe a person may be intoxicated. We, therefore, so hold.

Accordingly, we turn to the question of the proper foundation for the admission of HGN evidence. Accepting the position taken in *Superior Court* [footnote omitted], the court in *People v. Buening,* 592 N.E.2d 1222, 1227 (Ill. App. 5 Dist. 1992) held that the proper foundation for admitting HGN evidence should consist of describing the officer's education and experience in administering the test and showing that the procedure was properly administered. That is in keeping with our decision in *Smith* and was also the foundation requirement adopted in *Baue,* 607 N.W.2d at 205, where the court stated this was the majority rule and characterized it as sound. Again, we agree and adopt this as the necessary foundation for admitting HGN evidence.

. . . .

KIRSCH and ROBB, JJ., concurred.

CRAUN v. STATE, No. 49A02-0012-CR-810, ___ N.E.2d ___ (Ind. Ct. App. Feb. 6, 2002).
BROOK, C. J.

[T]he State charged Craun with six counts of child molestation involving H.D., D.D., and E.W. The trial court later severed the charges. . . .

. . .

Q. Okay. Was [H.D.] on the bed with you?
A. Yes, she was.
Q. And at that time, was there any inappropriate touching?
A. No.
Q. Did you rub her as she testified?
A. No, I did not.

. . .

A. I tickled [H.D.]
Q. Do you know as you sit there toddy [*sic*] whether you ticked [*sic*] her that night or not?
A. Yes, I do.
Q. Okay. And where?
A. On the upper part of her thigh.

At the close of direct examination, the State initiated the following sidebar:

I think that [Craun] has raised the defense of accident. He is saying that this tickling is what upset [H.D.] that night and I think he's claiming it's … I didn't touch her sexually I touched her on her upper thigh to tickle her and I think that opens

the door to some of the other girls. And I want to be able to question him about that.

. . . .

Craun asserts that the trial court erred in admitting evidence of his alleged molestations of D.D. and E.W. In particular, Craun argues that the evidence lacked probative value and "was extremely prejudicial and affected the outcome of the case" and thus should have been excluded under Indiana Evidence Rule 404(b).

. . . .

The State contends that the evidence is admissible to show Craun's motive and intent. The trial court instructed the jury that the evidence had "been received solely on the issue of [Craun's] intent or absence of accident." We cannot conclude, however, that E.W.'s and D.D.'s testimony was admissible for these or any other permissible purposes under Rule 404(b).

Assuming, *arguendo*, that Craun's motive was ever at issue, we are at a loss to determine how his alleged touching of E.W. and D.D. is relevant to his motive for touching H.D. [Citation omitted.] [Footnote omitted.] As for intent, Craun correctly states that this Rule 404(b) exception "will be available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent." *Wickizer v. State*, 626 N.E.2d 795, 799 (Ind. 1993). Craun contends that he did not affirmatively present a claim of contrary intent by stating that he tickled H.D.'s upper thigh, since he never stated that he touched her vagina, either accidentally or intentionally. We agree. Had Craun been accused of and charged with fondling H.D.'s upper thigh with intent to arouse or satisfy his sexual desires, we might reach a different conclusion, but such is not the case here. As for absence of accident, we reiterate that Craun never stated that he touched H.D.'s vagina, either accidentally or intentionally.[12]

Simply put, E.W.'s and D.D.'s testimony, "if relevant at all, shows a propensity for [child molesting], which is precisely what is prohibited by the Rules of Evidence." [Citations omitted.] [Footnote omitted.] Craun's alleged inappropriate touching of E.W. and D.D. did not make it more or less probable that he touched H.D. with the intent to "arouse or satisfy" his sexual desires under Indiana Code Section 35-42-4-3. [Citation omitted.] [Footnote omitted.] . . .

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[12] In *People v. Thomas*, 573 P.2d 433 (Cal. 1978) cited by the dissent regarding the absence of mistake exception under Rule 404(b), the victim testified that her father had fondled her breasts and vagina; the defendant admitted to touching his daughter's chest but claimed that he did so to apply cold medication. *See id*. at 443 (Clark, J., dissenting) Thus, Justice Clark reasoned, "[b]y 'acknowledg(ing) the physical touching of the child but assert(ing) his innocent intent' defendant placed his intent in issue, enabling the People to elicit the [prior bad acts testimony]." *Id*. (parentheses in original). Given that Craun never admitted to touching H.D.'s vagina, we do not find *Thomas* persuasive here.

RILEY, J., concurred.

KIRSCH, J., filed a separate written opinion in which he dissented, in part, as follows:

I believe the trial court acted within its discretion in admitting the prior bad act evidence, and, accordingly, I respectfully dissent.

. . . .

Here, the probative value of the prior bad act arises from the inference that because Craun committed similar acts of child molestation in the past, his claim of mistake in the present instance is less likely than it otherwise would be. Thus, the prior bad act evidence is not being used to prove that Craun committed the acts of molestation ("the forbidden inference") but to disprove that his claims that all he had done was tickle the child victim and that she was mistaken when she claimed to have been molested -- the permitted

inference. Indeed, this case is very similar to *People v. Thomas*, 20 Cal.3d 457, 143 Cal.Rep. 215, 573 P.2d 433 (1978) (Clark, J., dissenting) cited by our supreme court in *Lannan*. In *Thomas*, the defendant accused of molesting his daughter claimed that he was merely rubbing vaporizing cream on her chest for treatment of a cold. The dissenting opinion of Justice Clark argued that testimony of the defendant's other daughters that they, too, had been molested by their father was admissible to prove the defendant's true intent and absence of mistake. Our supreme court agreed, stating: "Evidence of prior sex offenses -- charged or uncharged --may also be admissible under Rule 404(b) to prove absence of mistake." *Lannan* at 1340.

So, too, here, I believe Craun's claim that H.D. mistook his tickling for something more sinister was inferentially less likely when viewed in the light of the prior bad act evidence that Craun touched other young girls inappropriately. The evidence was not used to prove the commission of the act, but to disprove Craun's claim of mistake. . . .

CIVIL LAW ISSUES

WARSCO v. HAMBRIGHT, No. 02S04-0104-CV-212, ___ N.E.2d ___ (Ind. Jan. 31, 2002).
BOEHM, J.

In 1985, Hambright was granted custody of her three children and awarded child support. Edwards fell behind in support and the total arrearage exceeded $19,000 when Hambright assigned her rights to the State in 1994.

On February 16, 1999, Hambright filed a Chapter 7 bankruptcy. On June 29, Mark A. Warsco, the trustee of her bankruptcy estate, sought to intervene in the paternity action claiming "an interest relating to a property . . . which is the subject of the action" under Trial Rule 24(A)(2). After argument, the trial court denied the petition to intervene: "The Court finds that said relief would be contrary to public policy concerning child support, and therefore, denies said Motion to Intervene and Receive Payments for Child Support Arrearage." . . . The Court of Appeals accepted jurisdiction and held that child support arrearages were an asset of the custodial parent and therefore Warsco could intervene as a matter of right. Warsco v. Hambright, 735 N.E.2d 844 (Ind. Ct. App. 2000). We granted transfer to address the nature of child support arrearages in Indiana.

. . . .

Warsco does not appear to contest the general proposition that parents hold current and future support as trustees for the children, but he argues that past child support arrearages are property of the custodial parent. He bases this contention on the premise that the custodial parent has already made up for the missed support by providing food, clothing, and other necessities from other sources during the period when child support was not paid. . . .

. . . .

We conclude that practical considerations and basic policy concerns prohibit permitting proof of the source of expenditures for the children to establish the custodial parent's individual right to arrearages. As a matter of law, arrearages, like current and future support, are held for the children, and the custodial parent has no individual property interest in them.[4] . . .

. . . .

For all these reasons, we think the preferable rule, and the rule dictated by current statutes, is that the issue is not open to litigation. The effect of this rule is to preclude the

[4] At the time of Warsco's motion to intervene, Hambright's three children were ages 18, 19, and 23. The record does not include the support order, nor does it indicate any circumstances under which Hambright's children would no longer be entitled to support or education expenses. We may not presume the emancipation of Hambright's children. [Citation omitted.] Therefore, we leave for another day the issue of whether the nature of the custodial parent's interest in an arrearage changes after a non-custodial parent's duty to support ends.

parents, with or without the children's concurrence, from agreeing on a reduction in past support. It also precludes creditors from reaching past support. . . .

. . . .

In sum, "[t]he bankruptcy court's jurisdiction over [debtor's] property extends only as far as [the debtor's] particular interest in the property." [Citation omitted.] Child support arrearages are held by the custodial parents for the benefit of the children. As such, child support arrearages are not property of the custodial parent, and a trustee in bankruptcy has no interest in them. Accordingly, Warsco has no right to intervene in the proceeding.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

CONTROL TECHNIQUES, INC. v. JOHNSON, No. 45S03-0202-CV-97, ___ N.E.2d ___ (Ind. Feb. 5, 2002).

BOEHM, J.

This case deals with the relationship between the Comparative Fault Act and the common law tort doctrine of superseding or intervening cause. The requirement of causation as an element of liability for a negligent act includes the requirement that the consequences be foreseeable. A superseding cause that forecloses liability of the original actor is, by definition, not reasonably foreseeable by a person standing in the shoes of that actor. Accordingly, the doctrine of superseding cause is simply an application of the larger concept of causation. Because an instruction on superseding cause would only further clarify proximate cause, the trial court's failure to give a separate jury instruction on superseding cause was not reversible error.

. . . John Johnson sustained serious burns to his arms and face in December of 1991 while measuring the voltage of a circuit breaker at the LTV Steel Plant in East Chicago, Indiana. A jury awarded him $2,000,000 and allocated eighty percent liability to Meade Electric Co., Inc., which installed the breaker, fifteen percent to Johnson, and five percent to Control Techniques, Inc. (Control), which designed and built the circuit breaker. Control was thus ordered to pay $100,000, representing its five percent of the total.

. . . Essentially, Control contended that Meade's method of installing the breaker was a superseding cause of the accident that foreclosed any liability Control may have had from the breaker's design and manufacture. The Court of Appeals concluded that the instructions on fault causation adequately covered the subject. Control Techniques, Inc. v. Johnson, 737 N.E.2d 393, 402 (Ind. Ct. App. 2000). We essentially agree with the Court of

Appeals, but grant transfer because of varying formulations of this issue reflected in recent Court of Appeals opinions.

. . . .

Here, the trial court refused Control's jury instruction on intervening cause, which is drawn verbatim from Indiana Pattern Jury Instructions-Civil 5.41 (2d ed. 2000):

> An intervening cause is an action by a third party or agency that breaks the causal connection between the defendant's alleged negligence and the plaintiff's injury. This intervening cause then becomes the direct cause of the injury.
> If you decide that the injury to the plaintiff would not have occurred without the action of the third party or agency, then the plaintiff cannot recover from the defendant.[3]

[3] Because we conclude that this instruction was properly refused for other reasons, we reserve judgment on the issue of whether the second paragraph is a correct statement of law. However, we note that this paragraph arguably injects an erroneous "but for" test into the causation analysis.

> However, if you find that the defendant acted negligently and could have reasonably foreseen the actions of the third party or agency, then the defendant can still be liable for the defendant's injuries.

. . . .

There is evidence in the record to support the giving of an instruction on superseding cause. However, to the extent that this instruction is a correct statement of the law, the substance of it was covered in the court's final instruction number 17: "'Proximate cause' is that cause which produces injury complained of and without which the result would not have occurred. That cause must lead in a natural and continuous sequence to the resulting injury."

Trial courts may properly elect to give an instruction on this doctrine if they conclude it would aid the jury in determining liability. However, this call is better left to the discretion of the trial courts, as they are in the best position to determine whether an instruction on superseding cause is useful. It was not error to instruct only on causation.

. . . .

SHEPARD, C. J., and RUCKER and SULLIVAN, JJ., concurred.

DICKSON, J., filed a separate written opinion in which he dissented, in part, as follows:

I agree that the adoption of the Indiana Comparative Fault Act did not affect the doctrine of superseding cause, and that the evidence in the record in this case supports giving an instruction on superseding cause. I dissent, however, as to whether the defendant's issue of superseding cause was adequately covered by other instructions, and as to whether the Comparative Fault Act abrogated the common law principle of joint and several liability for joint tortfeasors.

. . . .

SCHWARTZ v. GARY CMTY. SCH. CORP., No. 45A03-0103-CV-94, ___ N.E.2d ___ (Ind. Ct. App. Feb. 4, 2002).

RILEY, J.

Schwartz prevailed below on the issue of his entitlement to accumulated sick leave earned, but not paid, prior to the termination of his employment. This fact, he argues, brings his claim under the provisions of Indiana's Wage Payment Statute, Ind. Code § 22-2-5-1 *et seq.* The trial court disagreed, concluding that the sick leave did not constitute wages under the statute and, thus, denied his claim for liquidated damages and attorney's fees as provided in Ind. Code § 22-2-5-2. . . .

. . . .

The issue of whether payment for accrued but unused sick leave qualifies as wages for purpose of this statute is an issue of first impression in Indiana. We have, however, examined this issue within the context of both bonus payments and vacation pay, and those decisions guide us here. In *Wank v. Saint Francis College*, 740 N.E.2d 908, 912 (Ind. Ct. App. 2000), *trans. denied*, we determined that:

> Wages are "something akin to the wages paid on a regular, periodic basis for regular work done by the employee...." Deferred payment of compensation that accrued during an employee's tenure is a wage. For example, vacation pay, earned each week but deferred until a later time, is a wage.

Id. (citations omitted). *See also Die & Mold, Inc. v. Western,* 448 N.E.2d 44, 48 (Ind. Ct. App. 1983) ("vacation pay is additional wages, earned weekly, where only the time of payment is deferred."). Over his twenty-plus years of employment with GCSC, Schwartz had accrued 110 days of unpaid sick leave; thus, the trial court found that Schwartz was entitled to $5,500.00.

We are not persuaded by GCSC's argument that, because the sick benefit was paid upon termination of employment rather than on a regular, ongoing basis, the payment was exempted from the definition of wages. There appears no dispute that Schwartz could have used his sick days as he earned them during the tenure of his employment, but that he chose instead to defer their use until the end. . . .

In conclusion, we find no reason in this case to distinguish between the payment of accrued vacation pay, earned over time, and the payment of accrued sick pay, likewise accrued over time. [Footnote omitted.] For this reason, we find no evidence in the record sustaining the trial court's conclusion that the sick pay was not a wage.

. . . .

BARNES and MATTINGLY-MAY, JJ. concurred.

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CASE CLIPS TRANSFER TABLE

February 8, 2002

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	**N.E.2d citation, Ct. Appeals No.**	**Court of Appeals Holding Vacated by Transfer Grant**	**Transfer Granted**	**Supreme Court Opinion After Transfer**
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	
Shambaugh and Koorsen v. Carlisle	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.	10-24-00	
S.T. v. State	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion	10-24-00	
Tincher v. Davidson	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly	11-22-00	
New Castle Lodge v. St. Board of Tx. Comm.	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Reeder v. Harper	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Holley v. Childress	730 N.E.2d 743 67A05-9905-JV-321	Facts did not suffice to overcome presumption non-custodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error.	1-11-01	
Davidson v. State	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences.	1-17-01	
Mercantile Nat'l Bank v. First Builders	732 N.E.2d 1287 45A03-9904-CV-132	Materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure	2-9-01	
State Farm Fire & Casualty v. T.B.	728 N.E.2d 919 53A01-9908-CV-266	(1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to $300,000 plus post-judgment interest on entire amount of judgment until payment of its limits.	2-9-01	
Merritt v. Evansville Vanderburgh School Corp	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-9-01	
State v. Gerschoffer	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Healthscript, Inc. v. State	724 N.E.2d 265, *rhrg.* 740 N.E.2d 562 49A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	
Vadas v. Vadas	728 N.E.2d 250 45A04-9901-CV-18	Husband's father, whom wife sought to join, was never served (wife gave husband's attorney motion to join father) but is held to have submitted to divorce court's jurisdiction by appearing as witness; since father was joined, does not reach dispute in cases whether property titled to third parties not joined may be in the marital estate.	3-1-01	
N.D.F. v. State	735 N.E.2d 321 No. 49A02-0003-JV-164	Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two "prior unrelated delinquency adjudications"; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error	3-2-01	
Robertson v. State	740 N.E.2d 574 49A02-0006-CR-383	Hallway outside defendant's apartment was part of his "dwelling" for purposes of handgun license statute.	3-9-01	
Bradley v. City of New Castle	730 N.E.2d 771 33A01-9807-CV-281	Extent of changes to plan made in proceeding for remonstrance to annexation violated annexation fiscal plan requirement.	4-6-01	
King v. Northeast Security	732 N.E.2d 824 49A02-9907-CV-498	School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale.	4-6-01	
State v. Hammond	737 N.E.2d 425 41A04-0003-PC-126	Amendment of driving while suspended statute to require "validly" suspended license is properly applied to offense committed prior to amendment, which made "ameliorative" change to substantive crime intended to avoid supreme court's construction of statute as in effect of time of offense.	4-6-01	1-28-02. Statute work no change, and an untimely or incomplete suspension notice does not affect validity of suspension.
Buchanan v. State	742 N.E.2d 1018 18A04-0004-CR-167	Admission of pornographic material picturing children taken from child-molesting defendant's home was error under Ev. Rule 404(b).	5-10-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
McCary v. State	739 N.E.2d 193 49A02-0004-PC-226	Failure to interview policeman/probable-cause-affiant, when interview would have produced exculpatory evidence, was ineffective assistance of trial. Counsel on direct appeal was ineffective for noting issue but failing to make record of it via p.c. proceeding while raising ineffective assistance in other respects. Post-conviction court erred in holding res judicata applied under *Woods v. State* holding handed down after direct appeal..	5-10-01	1-18-02. Trial counsel ineffectiveness raised on direct appeal, and *res judicata*. No ineffective appellate counsel for having decided to raise trial ineffectiveness on direct appeal.
				1-4-02. 760 N.E.
Martin v. State	744 N.E.2d 574 No 45A05-0009-PC-379	Finds ineffective assistance of appellate counsel for waiving issue of supplemental instruction given during deliberations on accomplice liability.	6-14-01	1-4-02. 760 N.E.2d 597. Decision not to raise supplemental instruction was not ineffective assistance.
Catt v. Board of Comm'rs of Knox County	736 N.E.2d 341 (Ind. Ct. App. 2000) No. 42A01-9911-CV-396	County had duty of reasonable care to public to keep road in safe condition, and County's knowledge of repeated washs-outs of culvert and its continued failure to repair meant that wash-out due to rain was not a "temporary condition" giving County immunity.	6-14-01	
Ind. Dep't of Environmental Mgt. v. Bourbon Mini Mart, Inc.	741 N.E.2d 361 No. 50A03-9912-CV-476	(1) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against automobile dealership; (2) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against gasoline supplier pursuant to pre-amended version of state Underground Storage Tank (UST) laws; (3) amendment to state UST laws, which eliminated requirement that party seeking contribution toward remediation be faultless in causing leak, did not apply retroactively so as to allow contribution for response costs that were incurred before its effective date; and (4) third-party plaintiffs' action against gasoline supplier to recover ongoing remediation costs was not time barred.	6-14-01	
In re Ordinance No. X-03-96	744 N.E.2d 996 02A05-0002-CV-77	Annexation fiscal plan must have noncapital services estimates from a year after annexation and capital improvement estimates from three years after annexation.	7-18-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Corr v. Schultz	743 N.E.2d 1194 71A03-0006-CV-216	Construes uninsured motorist statutes to require comparison of what negligent party's insurer actually pays out with amount of insured's uninsured coverage; rejects prior Court of Appeals decision, *Sanders*, 644 N.E.2d 884, that uninsured statutes use comparison of negligent party's liability limits to uninsured coverage limit ("policy limits to policy limits" comparison); notes that not-for-publication decision from same accident, *Corr v. American Family Insurance*, used *Sanders* to hold that the correct analysis was to "compare the $600,000 per accident bodily injury liability limit under the two policies covering Balderas [negligent driver] to the $600,000 per accident underinsured motor vehicle limit of the policies under which Janel [Corr] was an insured; transfer also granted 7-18-01 in this unreported *Corr* case.	7-18-01	
Friedline v. Shelby Insurance Co.	739 N.E.2d 178 71A03-0004-CV-132	Applies Indiana Supreme Court cases finding ambiguity in liability policies' exclusions for "sudden and accidental" and "pollutant" as applied to gasoline to hold that "pollutants" exclusion as applied to carpet installation substances was ambiguous and that insurance company's refusal to defend, made with knowledge of these Supreme Court ambiguity decisions, was in bad faith.	7-18-01	
St. Vincent Hospital v. Steele	742 N.E.2d 1029 34A02-0005-CV-294	IC 22-2-5-2 Wage Payment Statute requires not only payment of wages at the usual frequency (e.g., each week, etc.) but also in the correct amount, so Hospital which relied on federal legislation and federal regulatory interpretation for its refusal to pay physician contract compensation amount was liable for attorney fees and liquidated damages under Statute.	7-18-01	
Smith v. State	748 N.E.2d 895 29A02-00100PC-640	Error to find PCR laches when petition was filed within 27 days of sentencing and all ensuing delays due to Public Defender; guilty plea to six theft counts, for stealing a single checkbook containing the six checks, was unintelligent due to counsel's failure to advise of "single larceny" rule; the theft of the checkbook and ensuing deposits of six forged checks at six different branches of the same bank in the same county "within a matter of hours" were a "single episode of criminal conduct" subject to limits on consecutive sentencing and counsel's failure to discuss the single episode limit also rendered plea unintelligent.	7-19-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Martin v. State	748 N.E.2d 428 03A01-0012-PC-412	Holds that no credit for time served is earned by one on probation as a condition of probation, distinguishing *Dishroon v. State* noting 2001 amendment providing for such credit is inapplicable.	8-10-01	
Dunson v. Dunson	744 N.E.2d 960 (Ind. Ct. App. 2001) 34A02-0006-CV-375	Construes emancipation statute to require only that child not be under the care or control of either parent without any requirement he also be able to support himself without parental assistance.	8-13-01	
D'Paffo v. State	749 N.E.2d 1235 (Ind. Ct. App. 2001) 28A004-0010-CR-442	Child molesting instruction's omission of element of intent to gratify sexual desires when touching was fundamental error, not waived by failure of appellant to object, notwithstanding defense that victim was never touched at all. When witnesses had been cross-examined and given chances to explain prior inconsistent statements, the statements themselves were properly excluded as impeachment, Evidence Rule 613.	8-24-01	
Farley Neighborhood Association v. Town of Speedway	747 N.E.2d 1132 49S02-0101-CR-43	Continuation of 45-year-old 50% surcharge on sewage service to customers outside municipality was arbitrary, irrational, and discriminatory..	9-20-01	
Neher v. Hobbs	752 N.E.2d 48 92A04-0008-CV-316	Trial judge erred in requiring new trial when jury found defendant negligent but awarded $ 0 damages, as jury clearly found injury was preexisting.	9-6-01	1-10-02. 760 N.E.2d 602. New trial ruling properly explained and supported, when defendant had stipulated plaintiff was injured in accident.
Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne	747 N.E.2d 638 02A04-0005-CV-219	Restaurant was subject to exception to City's anti-smoking ordinance.	9-20-01	
Hall Drive Ins, Triangle Park v. City of Fort Wayne	747 N.E.2d 643 02A03-0005-CV-189	Companion case to *Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne*, above	9-20-01	
Hinojosa v. State	752 N.E.2d 107 45A05-0010-CR-450	Third party may obtain grand jury transcripts based on statutory "particularized need," as here with police officer "whistleblower."	11-15-01	
Bowers v. Kushnic	743 N.E.2d 787 45A04-0004-CV-168	Under rule that, if the insured has done everything within her power to effect the change of beneficiary, substantial compliance with policy requirements can be sufficient to change the beneficiary, facts were not sufficient to show intent to change.	11-15-01	
Family and Social Services Admin. v. Schluttenhofer	750 N.E.2d 429 No. 91A02-0010-CV-638	Payment for medical expenses from injured's employer's policy was subject to IC 34-51-2-19 proportionality reduction of Medicaid lien.	11-15-01	

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Poananski v. Hovath .	749 N.E.2d 1283 No. 71A03-0101-CV-34	For summary judgment, the very fact that a dog bit a human without provocation is evidence from which a reasonable inference can be made that the dog had vicious tendencies, and it may be further inferred that if the dog had vicious tendencies based on this one incident, then a question of fact exists as to whether the dog owner knew or should have known of these tendencies	11-15-01	
Stegemoller v. AcandS, Inc.	749 N.E.2d 1216 No. 49A02-0006-CV-390	Wife of insulator who worked with asbestos did not qualify as a "bystander" who was reasonably expected to be in the vicinity of the product "during its reasonably expected use," and thus, she could not recover under Indiana Product Liability Act (IPLA).	11-15-01	
Ringham v. State	753 N.E.2d 29 No. 49A02-0009-CR-577	Reversible error not to have complied with Marion Superior statute which required an elected judge return to handle trial when prompt objection was made to master commissioner's presiding.	12-13-01	
Ratliff v. State	753 N.E.2d 38 No. 49A02-0010-CR-677	At scene of fleeing suspect's auto crash, police could have searched vehicle under either lawful arrest or "fleeting evidence" auto exceptions to warrant requirement, but after vehicle had been taken to police station to be searched neither exception continued to apply and warrant or lawful inventory search was required.	12-20-01	
Sholes v. Sholes	732 N.E.2d 1252 No. 27A02-9906-CV-445	IC 34-10-1-2 confers an absolute right upon any indigent civil litigant to counsel at government expense.	12-21-01	12-21-01. 760 N.E.2d 156. (1) Appointment of counsel under IC 34-10-1-2 for an indigent civil litigant is mandatory; (2) counsel must be compensated; (3) trial courts have power under Trial Rule 60.5 to order payment of appointed counsel, but (4) the same considerations governing other court-mandated funding apply in determining whether mandate is appropriate, and (5) counsel for whom mandate of compensation is not appropriate under T.R. 60.5 cannot constitutionally be appointed under the statute.

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
R.L. McCoy, Inc. v. Jack	752 N.E.2d 67 No. 49A02-0011-CV-749	When settlement agreement required negligence plaintiff to repay any excess to settling defendant (who would be nonparty at trial) if 1) the settlement payment amount exceeded the nonparty verdict; and 2) the excess would have operated as a set-off to another of the defendants *if the agreement were not a loan,* defendant was entitled to be repaid amount settlement exceeded its nonparty liability at trial.	12-27-01	
Ray-Hayes v. Heinamann	743 N.E.2d 777 No. 89A05-0007-CV-306	For purposes of statute of limitations, action was commenced when complaint was filed, even though copies of summons were not filed with clerk until after statute would have run.	1-2-02	1-02-02. 760 N.E.2d 172. Not just complaint but also copies of summons and filing fee are required to be filed and paid in order for action to "commence" for purposes of statutes of limitations.
Hollen v. State	740 N.E.2d 149	"Unless the trial court assigns a specific weight to each aggravator" the appellate court mus "guess at the Respective weight assigned to each factor."	5-25-01	1-23-02. No. 13S01-0102-CR-107. Court need not assign weight to each sentencing factor.
Control Techniques, Inc. v. Johnson	737 N.E.2d 393	Invervening cause doctrine is incorporated in comparative fault, and hence no error to refuse specific instructions on intervening cause.	1-5-02	1-5-02. No. 45S03-0202-CV-97. Doctrine of superseding or intervening cause is an application of causation, and as superseding cause instruction would only clarify other instructions given on causation a specific superseding cause instruction was not required.